A

Public Prosecutor v Toha bin M Yusuf & Ors

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–187 OF 2005
KN SEGARA J
19 JANUARY 2006

C *Criminal Procedure — Prosecution — Consent of Public Prosecutor — Transmission to High Court — Whether consent necessary before case can be transmitted — Dangerous Drugs Act 1952 ss 31B & 41A(1) — Criminal Procedure Code s 117*

Criminal Procedure — Sentencing — Mitigation — Plea of guilty — Accused fled from army at home country, whether amount to mitigation

D

Criminal Procedure — Sentencing — Policy considerations — Sentence must reflect seriousness of offence and deterrence to offender — Consistency — Trend of appellate court adopted

E *Criminal Procedure — Transfer of cases — Whether subordinate court has power to postpone the transfer of the case to the High Court — Whether consent of Public Prosecutor necessary before case can be transmitted to High Court — Dangerous Drugs Act 1952 ss 31B & 41A(1) — Criminal Procedure Code s 117*

F

The four accused were first produced in the magistrate's court charged under s 39B(1)(a) Dangerous Drugs Act 1952 ('the DDA') on 7 May 2004. The case was transmitted to and the accused were produced at the High Court for the first time on 6 January 2006, pursuant to the order of the magistrate made on 16 December
G 2005. One issue was whether the transmission of the case by the magistrate on 16 December 2005 to the High Court was a nullity because the consent of the Public Prosecutor to institute a prosecution under s 39B had not been tendered to the magistrate at any time, right from the first appearance of the accused before him on 7 May 2004 till the date of transmission on 16 December 2005.

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I was a nullity because the consent of the Public Prosecutor to institute a prosecution under s 39B had not been tendered to the magistrate at any time, right from the first appearance of the accused before him on 7 May 2004 till the date of transmission on 16 December 2005.

On 17 January 2006 the charge was read and explained to all the accused and their plea taken. The first, second and fourth accused claimed trial. The third accused

pleaded guilty to the charge. The learned deputy public prosecutor withdrew the charges against the three accused who claimed trial after the court had convicted and passed sentence on the accused who had pleaded guilty to the charge.

Held:

(1) The court took into consideration the third accused's plea in mitigation, and in particular, that he had pleaded guilty at the earliest opportunity. The fact that he was from Bandar Acheh and had allegedly fled to Malaysia to escape pursuit of the Indonesian Army was not a mitigating factor. The amount of the cannabis in his possession at the time of his arrest was a very large quantity. Therefore, any sentence passed must reflect the seriousness of the offence committed by the accused, both, in the public interest and the interest of the accused, and such sentence ought to act as a deterrent to the offender to steer clear from committing a similar offence in the future. The trend of sentencing of an appellate court must be adopted and followed by a court of original criminal jurisdiction. In the circumstances, the sentence of 18 years imprisonment, from date of arrest, and 10 strokes of whipping passed on the third accused found in possession of 2,618g of cannabis was appropriate (see para 12); *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625 followed.

(2) A prosecution for an offence under s 39B(1) is instituted only when the accused is called to plead to the charge in the High Court. An accused person can only be called to plead to the charge when he appears at the High Court pursuant to the provisions of s 41A(1) DDA. When the accused is produced before the High Court, upon the case being transmitted pursuant to s 41A(1) DDA, the question of any consent (written or oral) of the Public Prosecutor to institute a prosecution under s 39B is academic, as his deputy always appear personally in the High Court, and thus, there is necessarily an implied consent to the prosecution (see para 18).

(3) The provisions in the proviso to s 39B(3) DDA relating to the remand in custody of a person arrested, notwithstanding that a consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, and the last 11 words 'shall not be further prosecuted until the consent has been obtained', must be read in its proper context and in conjunction with s 31B DDA and s 117 Criminal Procedure Code, relating to the procedure where investigation cannot be completed within 24 hours by an officer of customs or a police officer. It would be a complete abuse of the law if the last 11 words of the proviso to s 39B(3) DDA is read and interpreted to enable, to authorize and legitimize detention in custody of any person by the customs or police until the consent of the Public Prosecutor is obtained, notwithstanding the expiration of any period of lawful detention authorized by a magistrate under s 31B DDA or s 117 Criminal Procedure Code (see para 19).

(4) The prior consent of the Public Prosecutor is not an essential pre-requisite to effect a transmission by the magistrate of a case triable exclusively by the High Court, pursuant to s 41A(1) DDA. The transmission of the case before the

High Court by the magistrate, on 16 December 2005, was not a nullity for any jurisdictional error, by reason of the absence of the consent of the Public Prosecutor before the magistrate. There had been an inordinate delay in the transmission of the case to the High Court, which delay was not sanctioned by the law. The order for transmission should have been made on the very first day the said charge was framed, read and explained to the accused (after the expiry of any lawful detention by the police under s 117 Criminal Procedure Code), consistent with the unequivocal requirements of s 41A(1) DDA (see para 29).

[Bahasa Malaysia summary

Empat tertuduh telah pada awalnya dihadapkan ke mahkamah majistret dan dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 pada 7 Mei 2004. Kes ini telah dikemukakan dan tertuduh dihadapkan ke Mahkamah Tnggi untuk pertama kali pada 6 Januari 2006, menurut perintah majistret yang dibuat pada 16 Disember 2005. Salah satu persoalan adalah sama ada penyampaian kes oleh majistret pada 16 Disember 2005 kepada Mahkamah Tinggi adalah tidak sah kerana persetujuan Pendakwa Raya untuk memulakan satu pendakwaan di bawah s 39B tidak ditenderkan kepada majistret pada bila-bila masa, bermula daripada kehadiran pertama tertuduh di hadapan beliau pada 7 Mei 2004 hingga tarikh penyampaian pada 16 Disember 2005.

Pada 17 Januari 2006, pertuduhan telah dibaca dan diterangkan kepada kesemua tertuduh dan pengakuan mereka diambil. Tertuduh pertama, kedua dan keempat memohon dibicarakan. Tertuduh ketiga telah mengaku bersalah terhadap pertuduhan. Timbalan Pendakwa Raya telah menarik balik pertuduhan-pertuduhan terhadap ketiga-tiga tertuduh yang menuntut perbicaraan setelah mahkamah menyabitkan dan menjatuhkan hukuman ke atas tertuduh yang telah membuat pengakuan bersalah terhadap pertuduhan itu.

Diputuskan:

(1) Mahkamah telah mempertimbangkan akuan tertuduh semasa mitigasi, dan khususnya, yang beliau telah mengaku bersalah pada peluang terawal. Hakikat bahawa beliau berasal dari Bandar Acheh dan dikatakan telah lari ke Malaysia untuk mengelakkan diri daripada Tentera Indonesia bukan satu faktor mitigasi. Jumlah kanabis dalam milikannya pada masa tangkapannya adalah dalam kuantiti yang besar. Oleh itu, apa-apa hukuman yang dijatuhkan hendaklah menggambarkan keseriusan kesalahan yang dilakukan oleh tertuduh, kedua-duanya, demi kepentingan awam dan kepentingan tertuduh, dan hukuman sedemikian hendaklah bertindak sebagai pencegahan kepada pesalah untuk menjauhkan diri daripada melakukan kesalahan sama di masa hadapan. Corak hukuman mahkamah rayuan hendaklah diamalkan dan diikuti oleh mahkamah yang mempunyai bidang kausa jenayah asal. Dalam keadaan sedemikian, hukuman penjara selama 18 tahun, dari tarikh tangkapan, dan 10 kali sebatan rotan yang dijatuhkan ke atas tertuduh ketiga yang didapati memiliki 2,618g kanabis adalah berpatutan (lihat perenggan 12); *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625 diikut.

(2) Pendakwaan untuk satu kesalahan di bawah s 39B(1) hanya dimulakan apabila tertuduh dipanggil untuk membuat pengakuan terhadap pertuduhan apabila beliau hadir di Mahkamah Tinggi menurut peruntukan s 41A(1) Akta Dadah Berbahaya 1952. Apabila tertuduh dihadapkan ke Mahkamah Tinggi, setelah kes disampaikan menurut s 41A(1) Akta Dadah Berbahaya 1952, persoalan berhubung apa-apa persetujuan (bertulis atau lisan) Pendakwa Raya untuk memulakan suatu pendakwaan di bawah s 39B adalah akademik, kerana timbalannya sering hadir secara peribadi di Mahkamah Tinggi, dan oleh itu, ia merupakan persetujuan tersirat kepada pihak pendakwa (lihat perenggan 18).

(3) Peruntukan dalam proviso kepada s 39B(3) Akta Dadah Berbahaya 1952 berkaitan reman dalam tahanan seseorang yang ditangkap, meskipun persetujuan Pendakwa Raya untuk memulakan pendakwaan terhadap kesalahan belum diperoleh, dan 11 perkataan terakhir 'shall not be further prosecuted until the consent has been obtained', hendaklah dibaca dalam konteks yang betul dan bersama s 31B Akta Dadah Berbahaya 1952 dan s 117 Kanun Tatacara Jenayah, berkaitan prosedur di mana siasatan tidak boleh diselesaikan dalam tempoh 24 jam oleh seorang pegawai kastam atau pegawai polis. Ia nyata merupakan satu penyalahgunaan undang-undang jika 11 perkataan terakhir proviso kepada s 39B(3) Akta Dadah Berbahaya 1952 dibaca dan ditafsirkan sebagai membolehkan, memberi kuasa dan mengesahkan penahanan dalam jagaan seseorang oleh pihak kastam atau polis sehingga persetujuan Pendakwa Raya diperoleh, meskipun telahpun tamat tempoh penahanan sah yang diberikan oleh majistret di bawah s 31B Akta Dadah Berbahaya 1952 atau s 117 Kanun Tatacara Jenayah (lihat perenggan 19).

(4) Persetujuan terdahulu Pendakwa Raya bukanlah satu pra syarat yang penting untuk melaksanakan penyampaian oleh majistret berhubung kes yang dibicarakan secara eksklusif oleh Mahkamah Tinggi, menurut s 41A Akta Dadah Berbahaya 1952. Penyampaian kes di hadapan Mahkamah Tinggi oleh majistret tersebut, pada 16 Disember 2005, bukanlah tidak sah kerana kesilapan bidang kuasa, oleh sebab ketiadaan persetujuan Pendakwa Raya di hadapan majistret. Kelewatan melampau dalam penyampaian kes tersebut ke Mahkamah Tinggi merupakan kelewatan yang tidak disanksikan oleh undang-undang. Perintah untuk penyampaian itu sepatutnya dibuat pada hari pertama pertuduhan dibuat, dibaca dan diterangkan kepada tertuduh (selepas tamat tempoh apa-apa penahanan sah oleh pihak polis di bawah s 117 Kanun Tatacara Jenayah), konsisten dengan keperluan nyata s 41A Akta Dadah Berbahaya 1952 (lihat perenggan 29).]

Notes

For cases on transfer of cases generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4163–4198.

Cases referred to

Perumal v PP [1970] 2 MLJ 265 (refd)
PP v Oladotun Lukmaru Umaru & Ors [1991] 1 MLJ 187 at p 188 (refd)
Yusmarin bin Samsudin v PP [1999] 4 MLJ 625 (folld)

Legislation referred to

Criminal Procedure Code ss 28, 117, 177A(1), (2)
Dangerous Drugs Act 1952 ss 31(B), 39A(2), 39B(1)(a), (2), (3), (4), 41(1), (2), 41A(1)
Penal Code s 302
Prevention of Corruption Act 1961 s 26(1), (2)

Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Joseph Tan (Chee Keong & Co) for the accused.

KN Segara J:

[1] The four accused, herein, were produced at the Shah Alam High Court for the first time, on 6 January 2006, pursuant to an order of the Magistrate, Mahkamah Majistret, Ampang made on 16 December 2005 transmitting case No 81–80 of 2004, in which the four accused stood charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). They were first produced in the Magistrate's Court, charged for an offence under s 39B(1)(a) DDA, on 7 May 2004, after having been arrested on 24 April 2004. The delay of 20 months for the case to be transmitted to the High Court has been cause of much concern to me, as it amounts to the denia: of the fundamental right of accused to a speedy trial and justice. It is rather disconcerting to note that inordinate delay of this nature in the transmission of cases from the Magistrate's Court in Selangor is rampant. This state of affairs must surely throw into disrepute the judiciary and call in question the current practice and procedure of magistrates in the transmission of cases, exclusively triable by the High Court under the DDA.

[2] A careful perusal of the particulars entered in the prescribed charge sheet (Courts 113 — Rev 4/01), together with the notes of proceedings by the magistrate right up to the date he made his order for transmission on 16 December 2005, reveals the following:

(1) the four accused are Indonesians;

(2) all the four accused were arrested on 24 April 2004;

(3) the complainant is Insp Mohd Husni bin Manaf from Jabatan Narkotik, IPPK Selangor;

(4) the charge, which was not dated or signed, reads as follows:

> Lampiran 'A'
>
> PERTUDUHAN:
>
> Bahawa kamu bersama-sama pada 24 April 2004 jam lebih kurang 9.30 malam di tepi perhentian bas stesen LRT Jalan Ampang, Batu 4 1/2, Ampang, di dalam negeri Selangor Darul Ehsan, telah mengedar (3) ketulan mampat yang dibaluti kertas timah dan plastik lutsinar mengandungi tumbuhan kering yang disyaki dadah

jenis ganja (anggaran berat) 3000g. Oleh itu, kamu telah melakukan satu kesalahan di bawah s 39b(1)(a) Akta Dadah Berbahaya (Pindaan 1998) dan dihukum di bawah s 39B Akta yang sama.

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(5) the first appearance of all the four accused before the magistrate was on 7 May 2004. The prosecuting officer was an Inspector;

(6) the charge was read and explained to each of the accused. No plea was taken. The magistrate ordered all four accused to be remanded till 22 June 2004;

[There is no reason given as to why the four accused were to be remanded till 22 June 2004. In the circumstances, I pause at this juncture to query what prohibited the magistrate from transmitting the case to the High Court on 7 May 2004, as the charge framed and read to the accused is one patently within the exclusive jurisdiction of the High Court (see s 41(1) and s 41A DDA)? For ease of comprehension the relevant provisions of s 41(1) and S 41A DDA are as follows:

41. Jurisdiction

(1) A Sessions Court or a Magistrates" Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, except an offence under section 39B,

41A. Special provisions relating to transmission of a ease to, and trial by, the High Court

(1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or, the accused shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court..., and cause the accused to appear before such court as soon as may be practicable.

(2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial...

(3) ...

(4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[Therefore, under which provisions of the law did the magistrate order the remand of the accused till 22 June 2004, bearing in mind:

(i) that the accused had been arrested on 24 April 04, and any power to remand under s 117 Criminal Procedure Code (for a total period not exceeding 13 days from the date of arrest) can only be exercised by the magistrate when a proper application is made in the manner provided for under s 117 Criminal Procedure Code by the investigating officer; and

(ii) it is mandatory for the magistrate (the appropriate subordinate court) under the provisions of s 41A(1) DDA to transmit the case to the High Court after the charge has been explained to him?]

(7) On 22 June 2004, all the accused were produced before the magistrate for the 2nd time. The prosecuting officer informed the magistrate that the chemist report was not ready. Thereupon, the magistrate remanded the accused till the 9 August 2004;

[Now, from where does the magistrate get his power to remand the accused, on the ground that the chemist report is not ready? In respect of this case, he has no jurisdiction to try at all. His only duty and authority, under s 41A(1) DDA, is to transmit the case to the High Court, after the charge has been explained to the accused.]

(8) On 9 August 2004, all the accused were produced before the magistrate for the 3rd time. Again, the prosecuting officer informed the magistrate that the chemist report was not ready, and the magistrate, thereupon, further remanded the accused till the 30 September 2004;

[Now, which provision of the law is it that requires the availability of the chemist report to the prosecution a necessary pre-requisite and a condition precedent that has to be satisfied, before the magistrate can transmit the case to the High Court under s 41A(1) DDA after the charge has been explained to him?]

(9) On 30 September 2004, all the accused were produced before the magistrate for the fourth time, and upon being informed by the prosecuting officer that the chemist report was still not available, the magistrate again ordered the accused to be remanded till 2 December 2004;

(10) On 2 December 2004, all the accused were produced before the magistrate for the 5th time, and upon the same tale of the chemist report repeated by the prosecuting officer, the magistrate further remanded the accused till 15 February 2005;

(11) On 15 February 2005, all the accused were produced before the magistrate for the 6th time. Again, the prosecuting officer repeated his familiar tale of the chemist report, and the magistrate further remanded the accused till 15 March 2005;

(12) On 15 March 2005, all the accused were produced before the magistrate for the 7th time. On this occasion, the prosecuting officer changes his tag line. He informed the magistrate that the investigation papers have been with the Deputy Public Prosecutor since 10 March 2005. Again, the magistrate fails to transmit the case to the High Court but instead, further remanded the accused till 12 May 2005;

(13) On 12 May 2005, all the accused were produced before the magistrate for the 8th time. On this occasion, the prosecuting officer informed the magistrate that he had just received the chemist report and he wanted to refer to the Deputy Public Prosecutor. Again, the magistrate failed to transmit the case to the High Court and, instead, remanded the accused further till the 7 July 2005;

(14) On 7 July 2005, all the accused were produced before the magistrate for the 9th time. However, the prosecuting officer had not received instructions

from the Head of Narcotics. Again, the magistrate failed to transmit the case to the High Court, and the accused were remanded by the magistrate till 1 August 2005;

(15) On 1 August 2005, all the accused were produced before the magistrate for the 10th time. The investigating officer was attending a course. Again, the magistrate failed to transmit the case to the High Court. The accused were further remanded till 16 September 2005;

(16) On 16 September 2005, all the accused were produced before the magistrate for the 11th time. Investigation papers were purportedly with the Deputy Public Prosecutor. Again, the magistrate did not transmit the case to the High Court. The accused were further remanded till 7 October 2005;

(17) On 7 October 2005, the accused were produced before the magistrate for the 12th time. Investigation papers were still, purportedly, with the Deputy Public Prosecutor. Again, the magistrate failed to transmit the case to the High Court. The accused were further remanded till 24 October 2005;

(18) On 24 October 2005, all the accused were produced before the magistrate for the 13th time. Investigation papers were still, purportedly, with the Deputy Public Prosecutor. Again, the magistrate failed to transmit the case to the High Court. The accused were further remanded till 14 November 2005;

(19) On 14 November 2005, all the accused were produced before the magistrate for the 14th time. Now, it would appear that the investigation papers had been sent to the OCPD by the Deputy Public Prosecutor with certain directions. Again, the magistrate failed to transmit the case to the High Court. The accused were further remanded till 28 November 2005;

(20) On 28 November 2005 all the accused were produced before the magistrate for the 15th time. The investigation papers were purportedly back with the Deputy Public Prosecutor. Again, the magistrate failed to transmit the case to the High Court. The accused were further remanded till 16 December 2005;

(21) On 16 December 2005, all the accused were produced before the magistrate for the 16th time. On this occasion, although the magistrate was informed that the investigation papers had been forwarded to Putrajaya, *he transmitted the case to High Court Shah Alam* and remanded the accused pending their appearance before the High Court on 6 January 2006. *There was no written consent to prosecute or requisition to transfer the case placed before him.*

[3] On 6 January 2006, all the four accused were produced before me at the High Court, Shah Alam and the case transmitted from the Magistrate's Court, Ampang (Maj Ampang K/T No 81–80 of 2004) was registered in the High Court Shah Alam as No 45–187 of 2005 on 19 December 2005.

[4] The four accused were unrepresented. The learned Deputy Public Prosecutor tendered a charge against all the accused for an offence under s 39A(2) DDA which was marked as exh P1. No charge for an offence under s 39B(1) DDA was preferred against any of the accused.

[5] The charge (exh P1) was read and explained to the accused and all of them claimed trial. The learned Deputy Public Prosecutor asked for a short mention date instead of fixing a trial date, as he wanted to get further instructions and explore the possibility for any one of the accused offering to plead guilty and the charge against the remaining accused withdrawn. The case was then fixed for mention on 13 January 2006.

[6] On 13 January 2006, all the four accused were produced before me again. On this occasion all the four accused were represented by one counsel. The charge (exh P1) was read and explained to them. All the four accused requested for a short adjournment to discuss with counsel their plea to the said charge. I granted their request and fixed the case for mention again on 17 January 2006.

[7] On 17 January 2006, all the four accused appeared before me and were still represented by the same counsel who appeared on 13 January 2006. The charge was read and explained to the accused and their plea taken. The first, second and fourth accused claimed trial. The third accused pleaded guilty to the charge and he understood the nature and consequences of his plea. The learned Deputy Public Prosecutor, thereupon, informed the court that he would withdraw the charge against the accused who claimed trial only after the court has convicted and passed sentence on the accused who had pleaded guilty to the charge. The court then fixed the case for disposal on 19 January 2006 (that is, for facts and sentence against the third accused).

[8] On 19 January 2006, all the four accused were produced before me again. They were all still represented by the same counsel. The charge was read and explained to them again and their respective pleas were taken and recorded. The charge reads as follows:

> Bahawa kamu bersama-sama pada 24 April 2004 jam lebih-kurang 9.30 malam di kawasan perhentianibas Stesyen LRT Jalan Ampang, Batu 4 1/2, Ampang, didalam Daerah Hulu Langat dalam Negeri Selangor Darul Ehsan, didalam meneruskan niat bcrsama kamu, telah ada dalam milikan kamu, dadah berbahaya sejumlah berat 2,618 gram cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan dibawah scksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah seksyen 39A(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[9] The third accused still maintained his plea of guilty and understood the nature and consequences of his plea. He maintained his plea even after the court explained to him what the maximum sentence was and that the court was empowered to impose the maximum sentence for the offence, notwithstanding his plea of guilty, should he be convicted after the facts of the case were tendered and admitted by him unequivocally. The first, second and fourth accused claimed trial.

[10] The learned Deputy Public Prosecutor proceeded to tender the facts of the case against the third accused and produced some relevant exhibits. The third accused admitted the facts and the exhibits. He was found guilty and convicted for the offence charged, on his own plea of guilty. The third accused was sentenced to 18 years imprisonment from the date of his arrest and 10 strokes of the whip.

[11] The facts tendered were as follows:

> Pada 24 April 2004 jam lebihkurang 8.45 malam, ketika Tertuduh berada di rumahnya di Kampung Pinggir, Lembah Jaya Selatan, Ampang, Selangor telah menerima panggilan daripada Toha bin Mohd Yusuf iaitu kawan tertuduh. Toha memberitahu beliau akan datang ke rumah Tertuduh bersama isterinya Nur Yani binti Rusdi.
>
> Kemudian Toha dan isterinya tiba di rumah Tertuduh menaiki sebuah kereta Proton Wira dengan nombor pendaftaran WDC 9263 (selepas ini dirujuk sebagai 'kereta tersebut').
>
> Tertuduh kemudiannya telah memasukkan cannabis seberat 2,618g yang disimpan di dalam sejbuah beg kertas yang bertulis 'MEMORIES' ke dalam kereta tersebut untuk diserahkan kepada seseorang di kawasan perhentian bas Stesyen LRT Jalan Ampang, Batu 41/2, Ampang, Selangor (selepas ini dirujuk sebagai 'tempat tersebut'). Cannabis tersebut telah(dimasukkan ke dalam kereta tersebut tanpa pengetahuan Toha dan isterinya. Tertuduh kemudian telah mengajak Toha untuk pergi berjumpa kawannya dan minta Toha menghantarnya ke sana.
>
> Tertuduh kemudiannya duduk di bahagian belakang kereta tersebut beraama cannabis tersebut. Tertuduh kemudiannya meminta Toha berhenti di tempat tersebut.
>
> Ketika Tertuduh sampai di tempat tersebut pada jam 9.30 malam, pihak polis telah menyerbu kereta tersebut: dan tangkapan telah dibuat terhadap Tertuduh, Toha dan Nur Yani.
>
> Pemeriksaan telah dijalankan terhadap kereta tersebut dan telah menjumpai beg kertas 'MEMORIES' yang berisi cannabis tersebut berada di tempat letak kaki belakang kereta di mana tertuduh duduk.
>
> Tangkapan aerta rampasan telah dibawa balik ke balai dan barang-barang kes kemudiannya telah dihantar ke Jabatan Kimia Petaling Jaya. Analisa telah dijalankan dan disahkan cannabis seberat 2,618g.

[12] Before the court meted out the sentence on the accused, the court took into consideration his plea in mitigation, and in particular, that he had pleaded guilty at the earliest opportunity. The fact that he was from Bandar Acheh and had allegedly fled to Malaysia to escape pursuit of the Indonesian Army did not impress me as a mitigating factor for the commission of the drug offence in Malaysia, soon after his arrival in Malaysia on 1 February 2004. The amountof the cannabis in his possession, in the skid car, at the time of his arrest, was a very large quantity. Therefore, any sentence passed must reflect the seriousness of the offence committed by the accused, both, in the public interest and the interest of the accused, and such sentence ought to act as a deterrent to the offender to steer clear from committing a similar offence in the future. There ought to be some consistency, too, in the sentence passed by the courts in similar cases, involving similar drugs of almost similar quantity. In any event, the trend of sentencing of an appellate court must be adopted and followed by a court of original criminal jurisdiction. A departure from such trend would only be

warranted in the event of some exceptional and special circumstances relating to the facts in the commission of the offence in question, coupled with some compelling mitigating factors. In *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625, the Court of Appeal found the appellant to be in possession of 2,863g of cannabis. He was convicted and sentenced by the appellate court to a term of 18 years and 12 strokes. In the circumstances, the sentence of 18 years imprisonment, from date of arrest, and 10 strokes of whipping passed on the third accused found in possession of 2,618g of cannabis, is, in my view, appropriate.

[13] After the third accused was convicted and sentenced, the learned Deputy Public Prosecutor applied to withdraw the charge against the first, second and fourth accused who had claimed trial. The said three accused were then, accordingly, acquitted and discharged.

[14] Now, having disposed off the case, I feel obliged to rule whether the transmission of the case by the magistrate, on 1 December 2005, to the High Court is a nullity, because the consent of the public prosecutor to institute a prosecution under s 39B had not been tendered to the Magistrate at any time, right from the first appearance of the accused before him on 7 May 2004, till the date of transmission on 16 December 2005.

[15] I shall first direct attention to s 39B(3) and (4) DDA which read:

> (3) *A prosecution* under this section *shall not be instituted* except by or with the consent of the Public Prosecutor;
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case *shall not be further prosecuted until the consent has been obtained.*
>
> (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions! of the law for the time being in force relating to criminal procedure shall be modified accordingly.

[16] When is the prosecution instituted within the meaning of s 39B(3) DDA? Section 26(1) and (2) of the Prevention of Corruption Act 1961 is identical to s 39B(3) and (4) DDA. The Federal Court, in *Perumal v Public Prosecutor* [1970] 2 MLJ 265 at p 268 said:

> We agree with Dato' Marshall that the point of time for the institution of prosecution within the meaning of section 26 of the Act is the moment at which the court asks the accused to plead to the charge.
>
> Dato' Marshall cites the following cases:
>
> *John Brooks & William Gibson; Thorpe v Priestnall; Beardsley v Giddings; Brooks v Bagshaw; Ng Yon Pee v Public Prosecutor; Haji Mohamed Paiman v Public Prosecutor.*
>
> We agree that in the light of the above authorities a prosecution is *normally* instituted when a complaint is laid or an arrest made. This was laid down as far back as in 1847 by *John Brooks & William Gibson,* supra. This wasi a prosecution for night poaching by armed...

...

But we agree that the proviso to subsection (1) and the new subsection (2) of section 26 of the Act limit the meaning of the phrase 'institution of prosecution' and for the purposes of this section a prosecution is *instituted when the accused is called upon to plead to the charge.* In other words, irrespective of what happened prior to that stage, *there must be a consent of the Public Prosecutor when the accused is called upon to plead.*

...

But we agree with Dato' Marshall that where the *Public Prosecutor* or his *deputy prosecutes from the inception* under the provisions of the Act *there is necessarily an implied consent to the prosecution,* but where he does not do so and yet the accused is called upon to plead, *consent* by the Public Prosecutor *given subsequently does not validate the institution* of the prosecution *unless* the court is satisfied that he or a colleague has in fact *given* such consent *prior to the moment of plea.*

[17] The offence of trafficking under s 39B(1) DDA punishable with death under s 39B(2) is certainly an offence triable exclusively by the High Court and, therefore, in law, no subordinate court can call upon an accused to plead to the charge. Naturally and logically, therefore, s 41A(1) DDA provides, in very explicit terms, that in respect of an offence triable exclusively by the High Court, the accused person shall be produced before the appropriate subordinate court, which shall, after the charge has been explained to him, transmit the case to the High Court, and cause the accused person to appear or brought before such court, as soon as may be practicable. Section 41A(1) DDA reads:

Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

[18] In view of the Federal Court decision in *Perumal v Public Prosecutor*, as to the meaning of the phrase 'institution of prosecution' vide sub-s (1) and the new sub-s (2) of s 26 of the Prevention of Corruption Act 1961, which is identical to subsection (3) and subsection (4) of section 39B of the DDA, a *prosecution is instituted* within the meaning of s 39B(3) DDA only *when the accused is called upon to plead to the charge.* However, there must be a consent of the Public Prosecutor *when the accused is called up to plead,* irrespective of what happened prior to that stage. Therefore, in respect of a charge under s 39B(1) DDA the question of obtaining the consent of the Public Prosecutor at the stage, immediately prior to the transmission, is a '*non-issue*', as the accused cannot be called up to plead to the charge at that stage, A prosecution for an offence under s 39B(1) is instituted only when the accused is called to plead to the charge in the High Court. An accused person can only be called to plead to the charge *when he appears at the High Court pursuant to the provisions of s 41A(1) DDA*. When the accused is produced in the High Court, upon the case being transmitted pursuant to s 41A(1) DDA, the question of any consent (written or oral) of the Public Prosecutor to institute a prosecution under s 39B is academic, as his deputy always appear personally in the High Court, and thus, there is necessarily an implied consent to the prosecution (see *Perumal v Public Prosecutor*).

[19] The provisions in the *proviso to s 39B(3) DDA* relating to the remand in custody of a person arrested, notwithstanding that a consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, and the last 11 words '*shall not be further prosecuted until the consent has been obtained*', must be read in its proper context and in conjunction with s 31B DDA and s 117 Criminal Procedure Code, relating to the procedure where investigation cannot be completed within twenty-four hours by an officer of customs or a police officer. The said last 11 words cannot be interpreted to authorize customs officers and police officers, effecting arrest of any persons for an alleged offence under s 39B(1) DDA, *to remand in custody any person indefinitely, on the purported ground or pretext that the consent of the Public Prosecutor has not been obtained.* Such detention would lead to abuse and mal-practices by customs and police officers effecting arrest of any person for an alleged offence under s 39B(1) DDA, and deny an accused person, arbitrarily, his fundamental right to a speedy and just trial in the court of competent jurisdiction. Section 3IB DDA and s 117 Criminal Procedure Code make it clear that the magistrate can only authorize detention in custody, from time to time, of any person arrested by the customs or police, for a term not exceeding 15 days in the whole, from the date of the arrest. It would be a complete abuse of the law if the last 11 words of the proviso to s 39B(3) DDA is read and interpreted to enable, to authorize and legitimize detention in custody of any person by the customs or police *until the consent of the Public Prosecutor is obtained*, notwithstanding the expiration of any period of lawful detention authorized by a magistrate under s 31B DDA or s 117 Criminal Procedure Code.

[20] Section 31B DDA reads:

> (1) Whenever any person is arrested and detained in custody by an officer of customs for an offence against this Act, it appears that the investigation cannot be completed within a period of twenty-four hours from the time that the person is arrested, any officer of customs may produce such person before a Magistrate and the Magistrate may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of such person in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole.
>
> (2) If the Magistrate acting under subsection (1) does not have jurisdiction to try the case and considers further detention unnecessary, he may order such person to be produced before a court having such jurisdiction, or, if the case is triable exclusively by the High Court, before himself or any Magistrate having jurisdiction with a view to transmitting the case for trial by the High Court.
>
> (3) Nothing in this section shall be construed in any manner derogating from the provisions of section 117 of the Criminal Procedure Code in its application in any case of an offence against this Act where the investigation is made by a police officer.

[21] Section 117 Criminal Procedure Code reads:

> (i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and at the same time produce the accused before such Magistrate.

(ii) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custo4y as such magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another magistrate with a view to committal for trial by the High Court.

(iii) A magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

[22] Section 28 Criminal Procedure Code reads:

28. How person arrested is to be dealt with and detention for more than twenty-four hours.

(i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court.

(ii) No police officer shall detain in custody a person arrested *without a warrant for a longer period* than *under all the* circumstances *of the case is reasonable.*

(iii) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

[23] The order for transmission of a case by a magistrate, under s 41A(1) DDA, is a judicial act, statutorily authorized. The last 11 words of the proviso to s 39B(3) DDA cannot be read and judicially interpreted in a manner that would interfere and obstruct the said judicial function of the magistrate under s 41A(1) DDA.

[24] The last 11 words of the proviso to s 39B(3) DDA are *salutary* and for *compliance* by *customs and police officers effecting arrest* of any person for an alleged offence under s 39B(1) DDA. Customs and police officers should act responsibly, fairly, and with a sense of urgency, to determine, within any lawfully authorized period of detention of any person granted by a magistrate under s 31B DDA or s 117 Criminal Procedure Code, whether on the evidence available, the institution of a prosecution under the said s 39B(1) DDA, is warranted. Thereafter, the customs/police should, accordingly, frame the charge, with the consent of the Public Prosecutor, to set in motion the process for transmission to the High Court, *without delay*. This ought to be achieved, at the latest, immediately upon the expiry of the period of detention granted by a magistrate under s 31B DDA or s 117 Criminal Procedure Code, to enable investigations to be completed. With modern day technology, communication between the customs/police and the Public Prosecutor to get the required consent, to frame a charge for an offence under s 39B(1) DDA, can be instantaneous.

[25] With respect, I do not agree with my brother judge, Edgar Joseph Jr J (as he then was), in *Public Prosecutor v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 at p 188 when he said:

> In my view when a magistrate makes an order for transmission under s 41A(1), that event although a judicial event, is a further step in the prosecution of the accused. It follows that that further step is barred until and unless the prior consent of the public prosecutor has been obtained.

[26] It is inconceivable, that in our system of the administration of justice, the Public Prosecutor can be allowed to control the judicial function of a magistrate to transmit a case exclusively triable in the High Court, by barring the transmission, in the absence of a prior consent from him. I must emphasize again, that the judicial power of transmission is statutorily vested upon a Magistrate under s 41A(1) DDA, and that power cannot be frustrated by introducing a condition precedent that must be satisfied for its exercise, unless expressly provided in the Act.

[27] 'Requisition' of the Public Prosecutor and 'Consent' of the Public Prosecutor are two independent subject matters under the DDA. The one should not be confused with the other. The 'Requisition' of the Public Prosecutor is only necessary for the purposes of a transmission of a case *not within the exclusive jurisdiction* of the High Court, that is, a case registered and scheduled for hearing either in the sessions court or magistrates' court but, nevertheless, the Public Prosecutor, in his wisdom, requires such a case to be tried in the High Court (see ss 41(1), 41(2) and 41A(1) DDA). For ease of reference the said s 41(1), s 41(2) and s 41A(1) DDA reads:

> (41)(1) A Sessions Court or a Magistrates' Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, except an offence under section 39B, and power to impose for any offence so tried the full punishment or penalty provided for that offence by this Act or by any regulations made thereunder, other than, in the case of a Magistrates' Court, imprisonment exceeding five years.
>
> Notwithstanding the provisions of subsection (1), the High Court shall have jurisdiction to try any case in respect of any offence under this Act if the Public Prosecutor requires any such case to be tried by the High Court.
>
> 41A(1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

[28] The 'Requisition' of the Public Prosecutor to try a case under s 39B(1) DDA is irrelevant, and does not arise, because such a case cannot, in the first place, be *registered and scheduled for hearing* either in the sessions court or the magistrates' court under s 41(1) DDA as the said Courts have no jurisdiction to try it. Therefore, there never will be a situation for the Public Prosecutor to require it to be tried in the High Court, under s 41(2) DDA. Instead, s 41A(1) DDA will come into operation, in an appropriate situation, and an order for transmission accordingly made by the magistrate to set in motion the wheels of justice at the High Court, for the grave offence alleged against the accused by the customs or police. Such cases should not be seen to be hibernating at the magistrates' court, with the police, customs or some unseen hand having control over its fate, before a transmission to the High Court is

effected. Magistrates should not be seen to have been manipulated, wittingly or unwittingly, in the transmission process, as would appear to be the position in the present case which was only transmitted to the High Court on the 16th appearance of the accused before the magistrate. I wish to observe that the current practice of producing and tendering a 'Requisition' by the Public Prosecutor in the High Court, immediately before the commencement of the trial of the accused for an offence under s 39B(1) DDA, is meaningless, redundant and has no force of law.

[29] For reasons already set out above, I rule that the prior consent of the Public Prosecutor is not an essential pre-requisite to effect a transmission by the magistrate of a case triable exclusively by the High Court, pursuant to s 41A(1) DDA. The transmission of the case before me by the magistrate, on 16 December 2005, is not a nullity for any jurisdictional error, by reason of the absence of the consent of the Public Prosecutor before the magistrate. There has been an inordinate delay in the transmission of the case to the High Court, which delay is *not sanctioned* by the law. The order for transmission should have been made ion the very first day the said charge was framed, read and explained to the accused (after the expiry of any lawful detention by the police under s 117 Criminal Procedure Code), consistent with the unequivocal requirements of s 41A(1) DDA.

[30] Perhaps I should take this opportunity to observe that in *all other criminal offences* triable in the High Court (which previously subjected an accused to a preliminary inquiry) currently calls for the exercise by a magistrate of his judicial! function under s 177A(2) Criminal Procedure Code to transmit the said case after the said charge has been read and explained to the accused, but without the accused being called upon to plead.

(A good example of such a case would be one where an accused is produced before a magistrate for the offence of murder, an offence under S 302 Penal Code).

[31] It is important to note that the provisions of s 177A(1) and (2) of the Criminal Procedure Code has incorporated almost all the provisions of s 39B(3), s 39B(4), s 41A(1) and s 41A(2), DDA, but slightly re-arranged in appearance. Section 177A Criminal Procedure Code reads as follows:

> (1) A prosecution in respect of an offence which is to be tried in the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.
>
> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such Court as soon as may practicable:
>
> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.

(3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[32] However, there is no significant difference to the purport and effect in its application in the Criminal Procedure Code, of the said similar provisions as found in the DDA. Therefore, magistrates should, as in cases under s 39B(1) DDA, when an accused is produced before them in respect of all other criminal offences triable in the High Court, have the charge read and explained to the accused and immediately, thereafter, transmit the case to the High Court. This would ensure that there would be no hibernation at the magistrate's court of cases triable in the High Court. All allegations of inordinate delay in the transmission of cases to the High Court by the magistrate will not be heard of, and hopefully, the judiciary would be on track to ensure speedy justice for accused faced with offences punishable with death. I do not think I would be far off the mark in observing, that wherever there are situations of inordinate delay, it opens the doors for abuse and corruption to those without scruples and agendas of their own. Magistrates should not, unwittingly, be responsible for such inordinate delays to the detriment of the accused and the image of the judiciary.

Order accordingly.

Reported by Loo Lai Mee